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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

No. 77-6073

FRANCIS LUND,	)	
	)	
Petitioner,	)	
	)	PETITION FOR
vs.	)	
	)	WRIT OF CERTIORARI
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

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IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

No. 77-6073

FRANCIS LUND, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	PETITION FOR WRIT OF CERTIORARI

COMES NOW the Petitioner, through his attorney, Eugene S. Hames, and for his Petition for Writ of Certiorari states as follows:

I. OPINIONS IN COURTS BELOW

Petitioner was convicted by a verdict of a jury of eight counts of violation of 15 U.S.C. §§ 77q(a) and 77x. He was sentenced to 18 years imprisonment and a fine of $40,000.00. Petitioner appealed to the Tenth Circuit Court of Appeals, which affirmed his conviction on January 4, 1977, in an opinion reported under United States v. Redmond, 546 F.2d 1386. A copy of that opinion is appended to this Petition as Exhibit A. A Petition for Rehearing was filed in the Tenth Circuit Court of Appeals, but was denied on December 21, 1977. A copy of that Order is appended to this Petition as Exhibit B.

II. JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

A. Petitioner seeks review of the judgment of the Tenth Circuit Court of Appeals dated January 4, 1977. See Exhibit A.

B. The Tenth Circuit Court of Appeals entered its Order denying the Petition for Rehearing on December 21, 1977. See Exhibit B.

C. Jurisdiction for review by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED FOR REVIEW

A. Whether the conduct and comments of the Honorable Willis W. Ritter (the trial judge) deprived the Petitioner of his constitutional right to a fair and impartial jury trial?

B. Whether the prosecution and the trial court suppressed exculpatory evidence when Judge Ritter required the presence throughout the trial of all witnesses under subpoena, when the prosecution nevertheless during the course of the trial released without notice a material witness, and when Judge Ritter denied a request by the defense for time to locate that same witness?

C. Whether the Petitioner was entitled to his requested jury instruction concerning his right to make in good faith mistakes of law and fact whenever he was acting in his capacity as an attorney and whether Petitioner had a right to a ruling on all jury instructions prior to closing argument?

D. Whether under 15 U.S.C. §§ 77q(a) and 77x, the allowable unit for prosecution is each device, scheme, artifice or course of business to defraud and whether conviction and sentencing for eight counts of violation of 15 U.S.C. § 77q(a), when only one device, scheme, artifice or course of business to defraud was proven, put Petitioner twice in jeopardy of life and limb for the same offense?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

A. Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his deference.

C. 15 U.S.C. § 77q:

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

D. 15 U.S.C. § 77x:

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

E. Rule 30, Federal Rules of Criminal Procedure:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects

and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

V. STATEMENT OF THE CASE

A. Jurisdiction

Federal jurisdiction in the Court of first instance (United States District Court) is 15 U.S.C. § 77q.

B. Facts

(1) Judge Ritter's prejudicial comments and conduct.

Exhibit C attached to this Petition sets forth Judge Ritter's prejudicial comments during the trial. It is of course impossible to fully recreate the atmosphere in the courtroom and the nuances in Judge Ritter's remarks in this brief Statement of the Case. Therefore, this Court is respectfully requested to review Exhibit C with the eye and the ear of a director staging a Shakespearean drama. Judge Ritter's remarks will then speak for themselves.

(2) Suppression of exculpatory evidence.

In the early stages of the trial the prosecution requested permission for witnesses to leave the Court subject to recall. The defendants did not object. Judge Ritter denied the request stating that he wanted them available for his own cross-examination. Later in the trial the prosecution released without notice Douglas W. Litchfield, an expert witness, who returned to Gold Creek, Montana. When defendants at trial attempted to call Mr. Litchfield to testify in their behalf, his absence became apparent. Judge Ritter denied the request for a recess to locate Mr. Litchfield. Mr. Litchfield

has executed an affidavit (Exhibit D) stating he would testify that the Red Creek Mine leased by Rio De Oro Mining Company (the underlying property supporting the value of the securities) was "a valuable, economically feasible, mineable mine" and that the coal lands leased by Rio De Oro were "extremely valuable" as the key to the acquisition of leases on surrounding lands due to the Federal Government's step-out leasing policies. Mr. Litchfield's testimony was therefore highly relevant and exculpatory on the question of whether Petitioner made any material misrepresentations about the securities and the underlying mining properties and whether Petitioner had the requisite criminal intent to defraud purchasers of securities or only made at worst a good faith mistake of fact.

(3) Jury Instruction.

Petitioner at all relevant times was a licensed attorney and on numerous occasions gave legal advice regarding the securities transactions. Because of his role, Petitioner requested but was denied a jury instruction to the effect that he would not have the requisite criminal intent to commit securities fraud if he in good faith made a mistake of law or fact. The trial court did not rule on tendered jury instructions prior to closing argument.

(4) Double Punishment.

Petitioner was sentenced on eight counts of violations of 15 U.S.C. §77q(a) to consecutive terms of 3-3-2-2-2-2-2-2 years and fined $5,000.00 on each of those eight counts. Total sentence is 18 years and total fine is $40,000.00. This multiple punishment relates to only one course of conduct,

namely, a course of business to defraud purchasers of securities in the Rio De Oro Mining Company and the underlying Red Creek Mine property.

VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. Judge Ritter's Prejudicial Comments and Conduct.

(1) The Tenth Circuit's decision in this case is in direct conflict with Bursten v. United States, 395 F.2d 976 (5th Cir. 1968). The facts in these two cases are as similar as can be on the issue of misconduct by a trial judge. Nevertheless, the 5th and 10th Circuits reach opposite results.

(2) The Tenth Circuit's decision is in conflict with the applicable decisions of this Court: Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933); United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933).

(3) The refusal of the Tenth Circuit Court of Appeals to grant Petitioner a new trial on the basis of Judge Ritter's prejudicial comments and conduct effectively sanctions his continuation of this behavior, which is inimical to "the public's interest in fair trials designed to end in just judgments", Wade v. Hunter, 336 U.S. 684 at 689, 69 S. Ct. 834, 93 L.Ed. 974 (1949), and calls for an exercise of this Court's supervisory powers over the trial judge.

Because of Judge Ritter's history of such unjudicial conduct, the government has commenced an original proceeding in the Tenth Circuit Court of Appeals entitled United States v. Ritter, No. 77-1829 (undecided). In its supporting brief

at 31 and 82, n. 49, the government specifically cites Petitioner's case (United States v. Rio De Oro Mining Co., CR 74-52) as an example of Judge Ritter's prejudicial conduct. The government's summary of Judge Ritter's abuse of justice distills the essence of his misconduct in Petitioner's trial:

> We do not impugn respondent's (Judge Ritter's) capacity or honesty as a judge. Our concern, rather, is that he has become a law unto himself. He invents and follows his own rules, is swayed by his own preconceptions of legal procedure and is determined that no outside force -- not the arguments of counsel, not the holdings of this Court (Tenth Circuit Court of Appeals) -- shall interfere with the conduct of his court. He feels no responsibility to the litigants to explain or justify his decisions, he brooks no argument and does not tolerate even well-mannered opposition to his views. He attempts to make his decisions in such a way that this Court will be unable to correct his errors.

See government brief at 114. The excerpts from the trial transcript in Exhibit C amply support the Petitioner's contention that in his case there has been a miscarriage of justice and the government's contention that Judge Ritter is a continuing threat to the judicial system in the United States District Court in and for the District of Utah.

(4) Even though the Tenth Circuit ruled that Judge Ritter's conduct was not prejudicial, it did admit that "the case before us comes close to the line." United States v. Redmond, supra, at 1391.

B. Exculpatory Evidence.

The issue of the government's suppression of exculpatory evidence presents a novel and important question

of law to be settled by this Court. Previous decisions have established that a defendant's due process rights are violated when (1) favorable evidence to the defense (2) of a material nature is (3) suppressed after a request by the defense. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The record establishes the first two points. The point to be resolved in this case is whether the government's release in the midst of trial and without notice to Petitioner of an out-of-state witness and the trial court's refusal to grant a recess to locate the witness constitute suppression of evidence.

The government's subpoena obviated the necessity of any formal request that the witness be retained, especially in view of the trial court's order that all witnesses be kept in the immediate vicinity for examination. Under these circumstances, not only the government but also the trial court suppressed highly favorable and material evidence that would have aided the jury in reaching a just verdict.

C. Jury Instructions.

(1) There is a conflict between the circuits on whether Rule 30, F.R.Crim.P., requires the trial judge in every instance to inform counsel on the instructions it will read to the jury. The Tenth Circuit rule as expressed in this case and prior decisions is that the failure to rule on jury instructions is reversible error only if counsel

requests a ruling and the failure to rule results in prejudice. United States v. Redmond, 546 F.2d at 1390, and the cases cited therein. In view of the express language of Rule 30 the better reasoned cases from other circuits hold that a ruling is required in every instance in order to avoid unnecessary error, United States v. Crescent-Kelvan Co., 164 F.2d 582 at 589 (3rd Cir. 1947), and in order "to allow counsel, knowing the instructions to be given, to effectively argue his case to the jury," United States v. Bass, 425 F.2d 161 at 163 (7th Cir. 1970).

(2) This is an important issue of criminal procedure that has yet to be addressed by this Court.

(3) Because the other instructions on good faith given by the Court were general and did not relate to the specific circumstances of Petitioner's involvement, and because trial counsel did not know whether he would be able to argue "mistake of law" based on the court's instructions, the failure to rule prejudiced trial counsel's ability to make an effective closing argument, which was his last and most important chance to communicate Petitioner's case to the jury.

(4) Petitioner was entitled to more than a general instruction on good faith. Because he played a role different from the other defendants, he was entitled to a specific instruction relating to the particular circumstances of his involvement. Every defendant, no matter what his function, is innocent if he makes a good faith mistake of fact relating, for example, to the economic viability of the enterprise.

Such a mistake precludes the existence of the required criminal intent. As a legal adviser Petitioner was entitled to make the same good faith mistake with respect to the law. A lawyer, at least for purposes of determining criminal intent, is entitled to make mistakes in his field just as any other expert can make a mistake in his field of expertise. A proper jury instruction would have made clear not only that an expert has the good faith defense in his particular field, but also that law is a field of expertise and a good faith mistake in rendering legal services is the same as any other mistake of fact. This is a point which is not obvious to a jury and upon which it needed instruction.

This is not a proceeding where only injunctive relief is sought against Petitioner and Petitioner's culpability can be reduced to mere negligence. Here criminal liability is sought to be imposed. See Securities and Exchange Comm. v. Spectrum, Ltd., 489 F.2d 535 at 542 (2d Cir. 1973). Therefore, the government must be held to strict proof and the jury must find that no good faith mistakes of law were made and that the requisite criminal intent did in fact exist.

D. Double Punishment.

(1) This Court has not addressed the important question of what constitutes the allowable unit of prosecution and punishment under 15 U.S.C. §§ 77q(a) and 77x. The statutory language and previous decisions of this Court

point to error by the trial court and the Tenth Circuit Court of Appeals in permitting eight prosecutions and convictions arising out of one course of conduct.

(a) Section 77q(a) itself refers to "device", "scheme", "artifice", "practice", and "course of business", all of which define behavior or actions spanning a considerable time and including numerous individual operations and transactions. This precludes prosecution for each specific representation and sale. Under the Fair Labor Standards Act and the Mann Act, despite statutory language making no reference to "course of conduct" but, on the contrary, referring specifically to "each" employee and "any" woman or girl, this Court held one course of conduct could not be turned into multiple offenses unless Congress clearly expressed such an intent. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952); Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955). Reversal for duplicitous prosecution in those cases mandates no less in this case.

(b) In authorizing a five year sentence and a $5,000.00 fine, § 77x refers not to each violation but only violations generally. Where there is ambiguity about the intent of Congress to punish separately for each particular offense, all doubts must be resolved in favor of lenity. Prince v. United States, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed. 2d 370 (1957); Heflin v. United States, 358 U.S. 415, 79 S. Ct. 451, 3 L.Ed.2d 407 (1959).

(2) Another important question to be resolved by this Court is whether prosecution, conviction and sentencing of Petitioner for eight separate counts in violation of § 77q(a) constitutes double jeopardy, when the basic crime charged is perpetuation of one scheme to defraud in the sale of securities. In such an instance the government's proof on each of the eight counts does not really contain any new elements, but only establishes the existence of the scheme, which by its very nature must be continuous. In re Snow, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887). Further, conviction for a scheme to defraud by selling securities and then conviction upon the sale of securities itself is a conviction for the same crime. The proof in each instance is the same.

WHEREFORE, the Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Dated this 18th day of January, 1978.

Respectfully submitted,

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